# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1944

## No. 13

ANTHONY CRAMER,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

## REPLY BRIEF FOR PETITIONER

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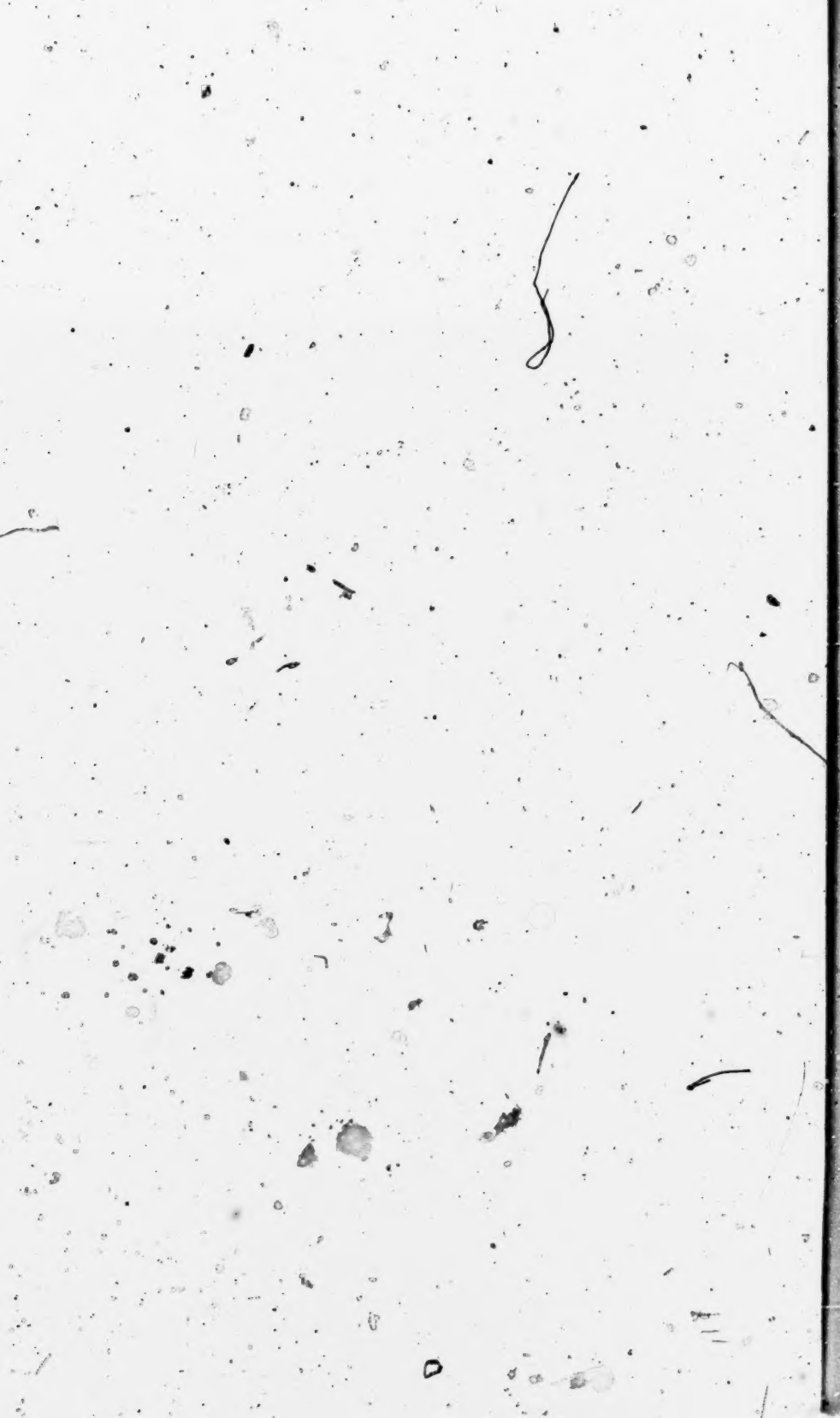

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### I

### A Review of the Respective Contentions of Petitioner and Respondent Concerning the Overt Act Requirement in the Treason of Adhering to Enemies.

Respondent's brief, and the Appendix thereto, are built around the erroneous thesis that it is petitioner's contention that proof of the overt act in treason must comprehend and establish the entire crime, that overt act and intent is a single element in the crime.

Petitioner has never so argued. Petitioner took pains to make this clear in the briefs submitted on this first argu-

ment of this case (see Pet. 1st reply brief, pp. 1-2), and in the brief submitted on this reargument (esg. Pet. 2nd brief, pp. 3, 5).

In the briefs submitted by petitioner to the court on the first argument of this case, petitioner contended that the overt act in treason must openly manifest treason. In this statement petitioner adopted the language of Judge Learned Hand in *United States* v. *Robinson*, 259 Fed. 685 (D. C., S. D. N. Y., 1919) who in turn had relied in part on Lord Chief Justice Reading's charge in *Rex* v. *Casement* [1917], 1 K. B. 98. It was apparent to petitioner, however, that Judge Hand and Lord Chief Justice Reading could not have meant, in their belief that the overt act in treason must "manifest a criminal intention," that proof of the overt act must of itself incontrovertibly establish the entire crime of treason. It is difficult to conceive any act which in itself completely demonstrates treasonable intent. There would usually be the question whether the accused knew the identity, as enemies, of the persons with whom he is alleged to have had treasonable dealings. Furthermore, evidence of the mere doing of any act fails to preclude the possibility that the act was done with a motive not treasonable. While providing the enemy with munitions of war or secret military information would be as clear an overt act of the treason of adhering to enemies as could be hoped for, the doing of these things in itself does not exclude, for example, the possibility of duress. Thus Hodges, in *United States* v. *Hodges* (see Pet. 2nd brief, pp. 34-35) was acquitted on his testimony that his returning enemy prisoners to the enemy was done to prevent the burning of the town and the destruction of its women and children. Accordingly, petitioner concluded that such eminent authorities as Judge Hand and Lord Chief Justice Reading must have meant that the overt act must "manifest treason" in the

sense that it must of itself give color and credence to the existence of the treasonable design (Pet. 1st reply brief, p. 2). This interpretation is consonant with the statement of Chief Justice Marshall in *United States* v. *Burr*, 25 Fed. Cas. No. 14,693, p. 169 (see Pet. 1st brief, p. 34 fn.), with respect to the treason of levying war:

> "Before leaving the opinion of the Supreme Court entirely, on the question of the nature of the assemblage which will constitute an act of levying war, this court cannot forbear to ask, why is an assemblage absolutely required? Is it not to judge in some measure of the end by the proportion which the means bear to the end? Why is it that a single armed individual entering a boat, and sailing down the Ohio for the avowed purpose of attacking New Orleans, could not be said to levy war? Is it not that he is apparently not in a condition to levy war?"

The additional research made possible by the Court's order for further argument enabled petitioner further to clarify this concept of overt acts. Clearly the treason of adhering to enemies, giving them aid and comfort, required something more than intention. Even if there were no overt act requirement with respect to this treason, some act would be required since "giving them aid and comfort" is a substantial element in the crime, and according to the authorities is explanatory of "adhering to their enemies" (see Pet. 2nd brief, p. 8).

In explaining what types of acts constitute the aid and comfort required, authorities such as Hawkins and Foster list such acts as furnishing the enemy with money, arms, ammunition, surrendering the king's castle, cruising in enemy ships, etc. (see Pet. 2nd brief, pp. 8, 9fn.). From this point it was logical to turn to examples of sufficient *overt acts* of the treason of adhering to enemies, giving them aid and comfort, to see if any distinction was drawn

between the act of aid and comfort required to establish the treason and the *overt act* of that treason required by the statute 25 Edward III and the Constitution of the United States. Petitioner found no distinction. Indeed the same acts which the authorities give as examples of the aid and comfort required are again given as examples of sufficient overt acts of the treason of adhering to enemies, giving them aid and comfort (see Pet. 2nd brief, pp. 14, 35).

This then was the clue to an understanding of the overt act requirement in the treason of adhering to enemies, giving them aid and comfort. The overt act must be an act sufficient to establish the crime in so far as the crime consists of an act. Such an act would, of course, lend color and credence to the existence of a treasonable design. In this sense the act cannot be divorced from intent. For the more the overt act on its face coincides with the definition of the act that is the treason, the more probable it is that the act was done with traitorous intent, since the apparent implications of the conduct become clearer as the act more evidently approaches the constitutional proscription (see Appendix to respondent's brief, p. 366).

No authority has been cited to disprove that such is the meaning of overt acts with respect to the treason of adhering to enemies, giving them aid and comfort. On the other hand, there is substantial authority to support it. As for English authority, the statute 25 Edward III states that the accused must be provably attained of his adhering to the enemy, giving them aid and comfort, by open deed. The proof of the act of aid and comfort lies in the overt act. Foster, East, and Lord Chief Justice Treby in *Rex* v. *Vaughan* [1696], 13 How. St. Tr. 485, 498, state that the overt act is the means used to accomplish the treason (see Pet. 2nd brief, pp. 13, 14, 20), and it is stated in Black-

stone's *Commentaries* (see Pet. 2nd brief, p. 14) and in Halsbury's, *The Laws of England* (see Pet. 2nd brief, p. 14), that the treason of adhering to the enemy, giving them aid and comfort must be proved by the overt acts. In every English case of the treason of adhering decided prior to our Constitutional Convention, except *Lord Preston's* case [1691], 12 How. St. Tr. 646, which has its own explanation (see Pet. 2nd brief, pp. 15 *et seq.*), the overt acts relied on are such as would establish the crime, given a traitorous intent.

To these authorities previously cited by petitioner may be added Hallam, who states that the overt acts alleged against the accused in treason must be such as "from which an inference of his guilt is immediately deducible" (see Appendix to respondent's brief, pp. 116, 116 fn., 117 fn.), and it is stated, in what is apparently the latest treatise on English criminal law (Harris and Wilshere's *Criminal Law*, 17th ed., London and Reading, 1943):

> "Every assistance given by the king's subjects to his enemies, unless under apprehension of immediate death in case of refusal, is an overt act of treason in this sense, e. g. to become naturalised in an enemy country in time of war; to raise forces for the king's enemies; to send them arms, money, or intelligence; or to join them in acts of hostility. An overt act of adherence must be proved, but the mere conspiracy to adhere might be an overt act of compassing the king's death . . . . . " (pp. 101-102, footnotes omitted).

As for American authority, the fact that the overt act was understood to be the act of treason, the act of giving aid and comfort, is made clear by the Pennsylvania Statute of 1777 and its counterparts in Connecticut, North Carolina and Vermont (see Pet. 2nd brief, pp. 24-28, Appendix to respondent's brief, p. 234), which required unequivocally that two witnesses prove the specific act which constituted the treason. Judge Peters in the *Case of Fries* (see Pet.

2nd brief, p. 32) states that treason consists of overt act and intention and in *United States* v. *Burr* (see Pet. 2nd brief, p. 33) Chief Justice Marshall states of the overt act in treason: "It is evidence of the crime consisting of this particular fact, not as establishing the general crime by a distinct fact."

From such authority petitioner has concluded that to be sufficient an overt act of the treason of adhering to enemies, giving them aid and comfort, must be such an act as, when coupled with evidence of the accused's owing allegiance to the United States, and a traitorous intent, would warrant the submission of the case to the jury. To justify submission to the jury of a case of the treason of adhering to enemies, giving them aid and comfort, there must, of course, be proof that the accused did an act which gave aid and comfort to an enemy. The overt act must be such an act; it must be an act which on its face gives the enemy aid and comfort.

If mere conspiracies and abortive attempts to give aid and comfort are held to be treason in the United States the definition of the overt act requirement must be phrased somewhat differently. While petitioner contends that the English cases holding attempts to be sufficient are not precedent in this country due to the dependence of this rule on the treason of compassing and imagining the death of the king and the omission of any such treason in our Constitution, nevertheless, if petitioner's contention is rejected, the overt act must at least be an act which if successfully carried out would give aid and comfort to the enemy in the sense of the only cases on the subject prior to the American Constitutional Convention, namely, that sending letters containing secret military information to the enemy is treason even though the letters are intercepted. If these cases are held to be precedent it is of the utmost importance to recognize the limits of that precedent.

By depositing in a Government letter-box a letter addressed to enemy agents and containing secret military information, the accused unequivocally lends color to the charge of treason. The act is complete on his part; he did all that he could. The act did not have the intended effect. But this was not for the reason that something yet remained to be done by the accused, nor for the reason that the accused later did an act which nullified the effect of the act of depositing the letter, nor for the reason that the enemy could not receive aid from the secret military information. The reason was simply that the letters were intercepted before reaching the enemy.

Petitioner's definition of overt acts in treason is clearly supported by the authorities. Such a definition precludes the sufficiency of innocent and insignificant acts which can somehow be related, by one witness, to the decisive and condemning act of aid and comfort itself established by one witness.

The reaction of respondent to our hypothetical case of the man who, with intent to reveal information of military matters to an enemy agent, arises, has his breakfast, walks to the house in question, rings the door-bell and finally, but under the observation of but a single witness, makes the disclosure to the enemy, goes to the heart of this phase of the case. Under the test proposed by respondent at the time of the first argument any one of the innocuous preliminaries would constitute a sufficient overt act, as each is "a part of a program or course of action the purpose and tendency of which are to adhere to the enemy, giving them aid and comfort, and must be related to, and in furtherance of, the accomplishment of the treasonable purpose" (Res. 1st brief, p. 23). But these innocent acts, at least as to the arising and the eating of breakfast, are now stated to be plainly insufficient. It is stated "Such acts would be insignificant in the treasonable scheme—in-

adequately related to it in terms of purpose and effectuation" (Res. 2nd brief, p. 65).[1] Apparently respondent has some lingering doubts about walking down the street and ringing the door-bell. It is stated that the fact that the accused "tied his shoelace" would of course not suffice (Res. 2nd brief, p. 65), although in the first brief respondent asserted that "raising one's hand" would meet the test (Rec. 1st brief, p. 34). In the same spirit respondent seems quite satisfied with the ruling in the *Pryor* case that going in the boat from the British vessel of war to the shore for provisions for the enemy would not be a sufficient overt act because not "sufficiently translated into the realm of action to satisfy the requirement of an overt act" (Res. 2nd brief, p. 62) but suggests that carrying provisions in the direction of the enemy "would be very different".

The test originally propounded is accordingly completely abandoned. But what does respondent substitute in its place? Nothing whatever, unless it be the vague suggestion that the act in order to be sufficient must be "adequately related to the act of adhering in terms of purpose and effectuation". This means nothing. Nor is clarification to be found in the distinction apparently made between eating breakfast on the one hand and walking down the street on the other. When analyzed this is found to be mere verbiage, not the formulation of any legal test or principle. Driven from one unsound position to an-

[1] The source of respondent's difficulties is probably explained in the following statement of the author of one of the appendices to its brief (Appendix, p. 366):

> "Of course, even though it be held proper in theory that the 'overt act' be simply some step in execution of the intent, and not such as necessarily evidences the intent, one might emerge with the practical result of requiring the latter, if he insisted that the act be very far along in execution. For the closer the act is to accomplishment, the more likely that it will in fact be some evidence of intent."

other respondent's contention resolves itself into mere empty words.

As opposed to this petitioner presents a wholly clear, workable principle which is open to no abuse or "construction" and which is amply supported by the most weighty precedents.

Respondent indicates (Res. 2nd Brief, p. 66) that the purpose of the overt act in the case of the treason of adhering is to prevent punishment merely for thought or intentions. But this cannot be true. Even if there were no overt act requirement with respect to the treason of adhering, no one could be convicted of this treason for mere thought or intention. The crime requires an act in any event, an act which gives aid and comfort to the enemy.

The purpose of the overt act and the allied two-witness requirement must then of necessity have greater significance. It is more than a bulwark against conviction for thought and intention. It is an assurance that no one shall be convicted of the greatest of all crimes unless the vital and decisive act, the act that constitutes the treason, is testified to by two witnesses. To assign to the overt act and the two-witness requirement any less function is to disregard completely all that is evidentiary of the importance of these concepts: the survival of the statutory overt act requirement for almost 600 years and its inclusion in the Constitution of the United States and in the constitutions of most of its component states; the provision of the statute 7 William III expressly excluding evidence of overt acts not alleged in the indictment; the voluminous discussion of these concepts by writers of treatises on the law of treason, and the extent to which their treatment of the law is centered on discussion of proper overt acts; the survival of the statutory two-witness requirement for almost 400 years, and the probability that the requirement existed at common law; the inclusion of the two-witness

requirement in the Constitution of the United States and in the constitutions of most of its component states, and the inclusion therein of a more rigid provision than the one prevailing in England, more rigid in the sense that it afforded greater protection to one accused of treason.

In its discussion of the English material respondent cites no authority which disproves that the overt act in the treason of adhering must be an act of treason. In its first brief, and on the first argument of this case, respondent relied most heavily on *Lord Preston's* case [1691], 12 How. St. Tr. 646. Respondent no longer relies on this case.

Indeed, respondent in its brief does not discuss or rely on any English case of the treason of adhering to enemies, whether decided before or after the American Constitutional Convention. While petitioner contends that these English cases are not relevant in interpreting the Constitutional definition of treason, for the reason that the omission of the treason of compassing made the Constitutional definition more restrictive, the English cases would, if anything, state the law in a sense the least favorable to petitioner. But, as far as the relationship of the overt act to the treason of adhering is concerned, petitioner has found that in every English case of the treason of adhering, with the exception of *Lord Preston's* case [1691], 12 How. St. Tr. 646, which has its own explanation based on requirements of venue (see Pet. 2nd brief, pp. 15-17), the overt acts relied on were such as proof of which, when coupled with evidence of the accused's owing allegiance to England, and evidence of a traitorous intent, would under the English law of the meaning of the treason of adhering warrant the jury in finding the accused guilty of treason (see Pet. 2nd brief, pp. 15-24).

Respondent now relies on the English law of overt acts as it concerns the English treason of compassing and imagining the death of the king. Respondent reviews the textual authority in England down to 1800. While respondent is troubled by the use of such words as "a signifier," "manifest," and the like, in describing the relationship of overt acts to the crime of treason, respondent concludes that a fair reading of the treatises as a whole supports its conclusion that overt act and treasonable intent are separate elements in the crime of treason. This petitioner concedes to the extent indicated (see *supra*, pp. 2-3, 4).

The only English case on which respondent relies is *Crohagan's* case, Cro. Car. 333, 79 Eng. Rep. 891 (see Res. 2nd brief, pp. 24-26), which is a case involving the treason of compassing and imagining the death of the king. Crohagan, an Irish Dominican priest, while on shipboard at Lisbon, spoke the words "I will kill the king if I may come to him." He later entered England and was tried and found guilty of the treason of compassing and imagining the death of the king. It is clear from the reports that the words were alleged as an overt act. While it is certain that it was alleged somewhere in Crohagan's indictment that he came into England for the purpose of killing the king, it is not certain that this act was alleged as an overt act of compassing and imagining the death of the king. Although Foster seems to imply that it was (see Res. 2nd brief, p. 25), Kelyng stated that speaking the words was the only overt act (see Appendix to Res. 2nd brief, p. 94). Hale states only that the act of coming into England for the purpose of killing the king "was somewhat of a overt-act" (see Res. 2nd brief, p. 24), and the report of the case mentions only that the speaking of

the words was testified to by two witnesses, stating further that "and for that his traiterous intent and the imagination of the heart is declared by these words, it was held high treason by the course of the common law, and within the express words of the statute of 25 Edw. 3, c. 2."

*Crohagan's* case interested the treatise writers only for its relevance to the question of whether words could constitute an overt act of the treason of compassing and imagining the death of the king. The authors of treatises on the law of treason opposed the idea that mere words could be an overt act of the treason of compassing, and their emphasis on the allegation that Crohagan came into England for the purpose of killing the king is evidently an attempt to bring the case within the realm of their principle that mere words would not suffice. In fact, however, it appears that Crohagan was convicted on the alleged overt act of his threat to kill the king. And on this point the case must be taken to have been overruled by subsequent decisions (see Appendix to Res. 2nd brief, p. 164).

Considering the usual statement of the treatise writers in discussing the treason of compassing that the overt act must "manifest" the treason (see Appendix to Res. 2nd brief, pp. 64-69, 76-77, 107), and the general statements to the same effect in cases of this treason (see Pet. 1st brief, pp. 25-27); there is nothing in this material to contradict petitioner's assertion that the overt act must be an act of treason.

There is grave danger, however, in using overt acts of compassing and imagining the death of the king as authority for the meaning of such acts in the treason of adhering to enemies, giving them aid and comfort, particularly in relying on specific overt acts alleged in cases of compassing.

The treason of compassing and imagining the death of the king was constructively extended to make it treason to compass and imagine other matters than the death of the king. Thus as the author of one of the appendices submitted by respondent states (Appendix, pp. 163-164, footnotes omitted):

> "The effect of this expansive application of the compassing branch, resulting in the creation of numerous constructive treasons, was to give the charge of compassing a significance beyond that of factual proof of the proscribed state of mind. As an analytical matter, if given conduct were held as matter of law to prove an intent that it did not prove as a matter of fact, it was really immaterial whether the defendant had entertained that intent. Thus, when conspiracy to imprison the king was held as matter of law to fall within the compassing branch, the real issue would not be whether the defendant had actually compassed or imagined the death of the king, but whether he had engaged in a conspiracy and had entertained the intent to imprison the king. If he had not so engaged, or had not so intended, he would not be guilty of the crime of compassing.
>
> "In this way a treason which was defined and originally regarded as consisting simply and actually of a particular state of mind was expanded to make treason of conduct carried on with a different state of mind."

Thus, since the meaning of the treason of compassing and imagining the death of the king was always in flux and indefinite, the meaning of an overt act of that treason, necessarily related to the meaning of the treason itself, must likewise be indefinite.

There is another significant consideration. The treason of compassing and imagining the death of the king makes treason of mere thought alone. The treason of adhering to the enemy, giving them aid and comfort, makes treason

of an act. While an overt act is required to "manifest" the compassing, what will demonstrate thought and intention is much more uncertain than the act which will demonstrate an act of giving the enemy aid and comfort. Thus as the author of one of the appendices to respondent's second brief states (appendix p. 166):

> "The branch of the statute defining adherence perhaps did not provide as pliant materials for fashioning constructive treasons. Unlike the treason of compassing, and like the treason of levying war, the treason of adherence seems defined primarily in terms of conduct. The statute did not stop with the words 'be adherent to the enemies of our Lord the King,' but went on to add 'giving to them aid and support * * *.' The statute appears therefore to deny an opportunity to seize on conduct and declare it to constitute the treason of adherence on the ground that it shows as a matter of fact or law a mental state of attachment to the enemy. On its face, it would seem, more obviously than the compassing provision, to require some quite definite translation of thought into action, as a requisite to the commission of the treason of adherence."

Moreover, respondent concedes, in discussing the leading English text-writers on treason, that "their primary concentration on treason by compassing inevitably tends to weaken their value as guides to the construction of a constitutional provision from which that branch of treason is omitted" (see Res. 2nd brief, p. 22). The refusal of American Courts to accept any doctrine having to do with the English treason of compassing as precedent in treason cases arising under the Constitution (see *infra*, pp. 27-28), reinforces this conviction.

An overt act of the treason of adhering to enemies, giving them aid and comfort, is, however, analogous to an overt act of the treason of levying war. Both treasons

call for an act rather than an imagination; both are included in the Constitutional definition of the crime. The quotation from East at pages 8 and 9 of petitioner's second brief shows how closely the two treasons are allied, and the propriety of this analogy, and this analogy alone, is recognized in one of the appendices to respondent's second brief (Appendix, p. 168).

There has never been a suggestion that the overt act in levying war can be anything less than an act which if done with traitorous intent would constitute levying war. A conspiracy to levy war does not constitute the treason of levying war either under the statute 25 Edward III or the Constitution of the United States (see Res. 2nd brief, p. 58). Since conspiracy to levy war is not the treason of levying war it is also an insufficient overt act of that treason (see Appendix to Res. 2nd brief, pp. 100, 320, 367). Respondent attempts to explain this by the statement that "The overt act must, it is true, advance the intent so far in execution that it can be said that war is being actually levied" (Res. 2nd brief, p. 60). To this petitioner repeats the observation of the author of one of the appendices to respondent's brief (Appendix, p. 366):

> "Of course, even though it be held proper in theory that the 'overt act' be simply some step in execution of the intent, and not such as necessarily evidences the intent, one might emerge with the practical result of requiring the latter, if he insisted that the act be very far along in execution. For the closer the act is to accomplishment, the more likely that it will in fact be some evidence of intent."

As respondent concedes with respect to the treason of levying war, so with treason of adhering to enemies, giving them aid and comfort—the overt act must advance the intent so far in execution that it can be said that aid and comfort is being actually given to the enemy.

The author of one of the appendices to respondent's brief states (Appendix, p. 166) of the treason of adhering to enemies, giving them aid and comfort:

> "On its face, it would seem, more obviously than the compassing provision, to require some quite definite translation of thought into action, as a requisite to the commission of the treason of adherence."

If anything in the law of treason is certain, it is the fact that only an act which constitutes levying war is a sufficient overt act of the treason of levying war. Indeed in *Regina* v. *Purchase*, [1710] 15 How. St. Tr. 651, it was held in England that no overt act as such need be specified in an indictment for the treason of levying war, since the statement of the facts constituting the levying war (see *supra*, p. 16), namely, that in such cases the overt p. 13fn.).[2] Coke was in accord (see Res. 2nd brief, p. 29fn.).

As for our treason of levying war, Chief Justice Marshall in *United States* v. *Burr*, (25 Fed. Cas. No. 14,692a), at page 13, states that "This high crime consists of overt acts . . ." (see Pet. 2nd brief, p. 33fn.), and Judge Peters in *Case of Fries*, (9 Fed. Cas. No. 5,126), states at p. 916, that the overt act and intention constitute this treason (see Pet. 2nd brief, p. 32).

Of course the most relevant discussion of the meaning of overt acts in the treason of adhering to enemies, giving them aid and comfort, is found in the cases of that particular treason. *Rex* v. *Vaughan*, [1696] 13 How. St. Tr. 485, is the only English case prior to the American Constitutional Convention in which this treason is found freed of association with the treason of compassing and imagining the death of the king. There Lord Chief Justice

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[2] The holding is noted only in *Regina* v. *Dammaree*, 15 How. St. Tr. 521, 546. See Appendix to respondent's brief, p. 145 fn.

Treby makes the following statement concerning overt acts of adhering to the enemy, giving them aid and comfort (p. 498):

> "And the overt act or acts, in this case, ought to be the particular actions, means, or manner by which the aid and comfort was given."

In other words, the overt act must be the act of treason.

Lord Chief Justice Treby's original doubt that an overt act was required with respect to the treason of adhering to enemies, giving them aid and comfort (see Res. 2nd brief, p. 21 fn.), springs not from any problem of interpreting the statute 25 Edward III, which most clearly required an overt act in this treason, but from the same logic that prompted the Court in *Regina* v. *Purchase*, [1710] 15 How. St. Tr. 651, to hold that no overt act as such was required in the case of the treason of levying war (see *supra*, p. 21), namely, that in such cases the overt act as such is superfluous since the indictment must charge the means by which war was levied and aid and comfort given, and this is the overt act. Lord Chief Justice Treby's conviction that an overt act was required with respect to the treason of compassing and imagining the death of the king, stems from the fact that this treason, alone of all the treasons, does not call for an act.

It is abundantly clear that in England, up to the time of the American Constitutional Convention, and indeed to the present time, the meaning of an overt act of the treason of adhering to enemies giving them aid and comfort, has been that the overt act must be the act of treason, the means by which the aid and comfort is given, the act that when shown to have been done with traitorous intent would warrant the jury in finding the accused guilty of this treason.

As for the meaning of overt acts of the treason of adhering to enemies, giving them aid and comfort, in the American states prior to the Constitutional Convention, petitioner in his second brief at pages 25-27, sets forth the Pennsylvania Statute of 1777 with respect to treason. As conclusive evidence of the meaning of an overt act, petitioner pointed out that under the Pennsylvania statute, two witnesses are required to testify to the very act that is specified in the statute to be treason.[3]

Statutes similar to the Pennsylvania statute were passed during this period in Connecticut, North Carolina, and Vermont (see *Appendix* to respondent's brief, p. 234). The fact that the nine remaining original states passed statutes containing, as concerns the treason of adhering, the general phraseology of the statute 25 Edward III, (see Appendix to respondent's brief, p. 234) is not important. Petitioner would contend that the meaning of the overt act of the treason of adhering under these statutes was that the overt act must be an act of treason. What is significant is that in those states where it was found desirable to change the phraseology of the crime of the treason of adhering to the enemy, giving them aid and comfort, a change was made in a particular which caused it to be beyond dispute that the act to which two witnesses must testify is the act which constitutes the act of treason.

Respondent's discussion of treason under the Constitution deals exclusively with petitioner's contention that the Constitutional definition established an entirely new pat-

[3] Respondent states (2nd brief, p. 44 fn.) that under petitioner's view of this statute a conspiracy to adhere to the enemy must be taken as constituting treason by adherence. But the Pennsylvania statute says "or shall form or be any way concerned in forming any combination, plot or conspiracy *for betraying this state or the United States of America into the hands or power of any foreign enemy.*" This clearly called for more than the usual aid and comfort to the enemy, and undoubtedly contemplated treason in high places.

term of the law of treason—a proposition which petitioner will consider presently—and with the proposition that the overt act and intent are distinct elements in the law of treason, a theory which petitioner concedes to the extent indicated (see *supra*, pp. 2-3, 4).

For support of his proposition that in cases under the American Constitution the overt act must be an act of treason, an act which if done with traitorous intent would constitute treason, petitioner relies on the opinion of Chief Justice Marshall in *United States* v. *Burr*, 25 Fed. Cas. No. 14,693, that the overt act "is evidence of the crime consisting of this particular fact, not as establishing the general crime by a distinct fact". (see Pet. 2nd brief, p. 33), the statement of Judge Peters in *Case of Fries*, 9 Fed. Cas. No. 5, 126, that "the overt act and the intention" constitute treason (see Pet. 2nd Brief, p. 32), and the statement of Judge Learned Hand in *United States* v. *Robinson*, 259 Fed. 685, that the overt act must openly manifest treason (see Pet. 2nd brief, pp. 36-37).

While respondent readily concedes that a restrictive approach to treason is a marked characteristic of the law of treason under the United States Constitution (see Res. 2nd brief, pp. 56-57) it states that the required approach is satisfied by a strict rule of proof in the establishment of intent. While clear proof of the specific intent is undoubtedly required, logically there is no reason for a stricter rule concerning proof of the specific intent in treason than in other crimes requiring specific intent. The unique feature of the law of treason in the United States is not the requirement of specific intent, but the requirement that there must be two witnesses to the same overt act of the crime. In this sense the American law of treason is doubly restrictive since the Constitutional provision concerning proof of the overt act is more restrictive than the

English provision which was itself restrictive of conviction of the crime.

Of course the two-witness rule loses all significance if the act to which the two witnesses must testify is "any act", or some insignificant act which can somehow be related, by one witness, to the decisive and condemning act of aid and comfort which is itself established by the testimony of but one witness.

## II

## Attempts to Give the Enemy Aid and Comfort Are Not Treason under the Constitution

Prior to the American Constitutional Convention it was implicitly or directly held in England, that carrying letters (*Lord Preston's* case [1691], 12 How. St. Tr. 646, or sending letters (*Regina* v. *Gregg* [1708], 14 How. St. Tr. 1371; *Rex* v. *Hensey* [1758], 19 How. St. Tr. 1341, *Rex* v. *De La Motte* [1781], 21 How. St. Tr. 687, *Rex* v. *Fyrie*, [1782], 21 How. St. Tr. 815) to the enemy containing secret military information was treason even though the letters were intercepted. Only in these particular cases of sending such information was an unsuccessful attempt held to be treason. Although *Rex* v. *Vaughan* [1691], 13 How. St. Tr. 485, is sometimes cited as support for the proposition that an attempt to give aid and comfort can be treason, it seems clear that in that case aid and comfort to the enemy was actually given (see Pet. 2nd brief, pp. 18-19). In view of the special reason given for the sufficiency of an attempt in cases of sending such letters to the enemy by Lord Chief Justice the Earl of Clonwell in *Rex* v. *Jackson* [1794] 25 How. St. Tr. 783, 871 (see Pet. 2nd brief, p. 11 fn.), it may be doubted whether it was generally understood that

attempts to give aid and comfort would be treason in any case.

But be that as it may, it is clear that the doctrine that carrying or sending letters to the enemy containing secret military information would be treason, even though the letters were intercepted, developed from the joining in one indictment the treason of compassing and imagining the death of the king, and the treason of adhering to the king's enemies, giving them aid and comfort.

With respect to the treason of compassing the king's death it was not necessary that the attempt to aid the enemy should be successful. All that was required in the treason of compassing was some act to evidence the accused's state of mind, some act to show that he was imagining the king's death, or in fact, just imagining some lesser evils such as deposing the king, taking possession of his person, attempting to remove his counsellors, compelling him by force to yield to certain demands, which, if anything were done about them, would have the possible effect of injuring the king (see East, *Pleas of the Crown*, Vol. I, Ch. II, § 7, also *supra*, p. 13). An attempt to aid the king's enemies was as sufficient a manifestation of such imagining as the actual giving of aid to the enemy. The treason of adhering, however, on the face of its definition in the statute 25 Edward III called for actual aid and comfort to the enemy.

In every English case before the American Constitutional Convention in which an unsuccessful attempt to give aid and comfort was recognized to be treason, the treason of adhering was joined with the treason of compassing. Since the attempt to give aid and comfort was clearly a sufficient overt act of compassing, it was of little importance, in any case where the treasons of compassing and adhering were joined, to make a distinction in the case of the treason of

adhering since the accused would be guilty of treason in any event and would under the compassing count suffer the maximum penality: death, and not a merciful one.[3a] The prime consideration given to the more familiar and more pliable treason of compassing in cases where that treason is joined with the treason of adhering, so permeates the law of the treason of adhering as recognized in the cases, as to prompt the author of one of the appendices to respondent's brief to express real doubt whether *Lord Preston's* case, in which the two are joined, could be used as an authority

[3a] The unimportance of drawing the distinction is strikingly indicated by Foster's refusal to state forthrightly that sending letters to the enemy containing secret military information was an overt act of adhering, and his preference to explain cases so holding on the theory of the treason of compassing:

> "The cases cited * * * did not in truth turn singly upon the rule here laid down, though I think the rule may very well be supported. For *Gregg* was indicted for *compassing the death* of the Queen, and also for *adhering to her* enemies; and *Hensey's* indictment was in the same form, and so was Lord *Preston's* * * *; and the writing and sending the letters of intelligence, which, in the cases of *Gregg* and *Hensey, were stopped at the post-office*, was laid as an overt act of both the species of treason: so that admitting for argument's sake, which is by no means admitted, that it was not an overt act of *adhering*, since the letters never came to the enemy's hands and consequently no *aid* or *comfort* was actually given, yet the bare writing and sending them to the post-office, in order to be delivered to the enemy, was undoubtedly an overt act of the other species of treason. In *Gregg's* case the judges did resolve, that it was an overt act of both the species of treason charged on him; and in *Hensey's* the court adopted that opinion and cited it with approbation." (see Appendix to respondent's brief, pp. 99-100)

It can at least be said that to Foster's mind the statement that such an act was an overt act of adhering would be a matter requiring some argument which he did not see fit to make in view of the undoubted fact that the act would be a sufficient overt act of the treason of compassing.

In *Rex* v. *Cooke*, [1696] 13 How. St. Tr. 311, Lord Chief Justice Treby showed the same reticence to hold that a conspiracy to give aid and comfort was a sufficient overt act of the treason of adhering and indicated the unimportance of so deciding since such a conspiracy was so certainly

for any point involving the treason of adhering under the United States Constitution (*see Appendix*, p. 140).

Whether an attempt to give aid and comfort to any enemy would be held in England at the present time to be the treason of adhering under the statute 25 Edward III is far from clear. Archbold states that a conspiracy to adhere does not constitute that treason in England (see Appendix to respondent's brief, pp. 111-112) and the latest treatise on English criminal law is in accord (see *supra*, p. 5).

Respondent concedes that "there is no easy answer to the question how far English doctrines of the law of treason were intended to be incorporated into our constitutional definition" (Res. 2nd brief, pp. 14-15).

There is early evidence in America that the desire of this country was to take over the treason of adhering to the enemy, giving them aid and comfort, without the affecta-

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a sufficient overt act of the treason of compassing and imagining the death of the king:

> "there are laid in the indictment two sorts of treason: the one is compassing and imagining the death of the king, the other is adhering to the king's enemies. The evidence to prove these treasons seems to be joint; for, as to that of compassing and imagining the king's death, as well as to the other, the overt acts are meeting and consulting about the treason; and then agreeing and resolving to invite and procure an invasion from France, and to meet that invasion with an insurrection here. And the evidence is applied equally to prove these acts.
>
> Gentlemen, that these are proper overt acts of compassing the king's death, I need not inform you, the law is very well known; and the prisoner's own counsel do acknowledge, that these are sufficient overt acts of compassing and imagining the king's death: so that all which they defend him by is, the improbability of the testimony given against him." (see Appendix to respondent's brief, p. 141)

The failure of Lord Chief Justice Holt in *Rex* v. *Freind*, [1696] 13 How. St. Tr. 1, and in *Rex* v. *Parkins*, [1696] 13 How. St. Tr. 63 to submit the treason of adhering to the jury where that treason was coupled in the indictment with the treason of compassing (see Pet. 2nd brief, p. 20) is indication of the overwhelming attention focused on the treason of compassing in such cases.

tions which association with the treason of compassing had imposed upon it. It will be remembered that in England, the only attempt recognized to constitute the treason of adhering was the sending of letters containing secret military information which were intercepted. Thus in the Pennsylvania Statute of 1777, and in its counterparts in Connecticut, North Carolina, and Vermont, an attempt to convey intelligence to the enemies of the State or the United States is made misprision of treason, not treason. Under the Pennsylvania statute the Courts went so far as to hold that the provision "persuading others to enlist" in the army of the enemy (see Pet. 2nd brief p. 25) meant successful persuasion and that the accused was not guilty if the one whom he tried to prevail upon to enlist in the British Army refused to enlist. *Respublica* v. *Roberts*, 1 Dall. 39.

The Constitution of the United States omits any treason comparable to the English treason of compassing, and rejects as well any of the subsidiary treasons that developed under that treason, for example, conspiracy to levy war.

The author of one of the appendices to respondent's second brief concludes (Appendix, pp. 278-279):

> "The omission from the constitutional clause of any provision analogous to that in English law which punished compassing the death of the king removed the foundation on which the English judges had built much of the reprobated structure of 'constructive' treasons. It is a fair inference, in view of the vigor with which the restrictive policy of the Constitution emerges from the evidence, that it would violate that policy to import into our law English doctrine based on the omitted clause of the Statute of Edward III: Even so there were in English history ingenious constructions under those clauses of the Statute which the Constitution did adopt, and if the full gloss is to

be taken with the clauses, the limiting value attributed to the use of the familiar words might be considerably depreciated. The problem is made the more difficult because in England indictments often contained counts under both the charges of compassing the king's death and levying war against him, or adhering to his enemies; and broad rulings of the courts did not draw distinctions as to the relative scope of these different charges. All that can be said is that, so far as the contemporary materials are concerned, their weight is clearly in favor of resolving doubts on the side of precise definition of the offense. Obviously this is the point of Wilson's law lectures."

Another author in the appendices states (Appendix, pp. 371-372):

"Most of the excesses of the English law of treason, prior to the 18th century, can be described in terms of a treasonable intent found by inference under the head of compassing the death of the king: men were convicted not on evidence fairly showing that they had planned the king's death and the overthrow of the government, but on the basis of expression or advocacy of ideas or measures whose 'natural' consequences, as deduced by their political foes, might involve harm to the king or the state. The overwhelming evidence is that the treason clause of the United States Constitution was intended to limit the scope of that offense; and, as we have seen, that is the admonition of policy on which the courts of this country have centered ever since. As the treason clause is the product not of theory, but of history, the practical meaning of its restrictive policy should be drawn from history. The most obvious manner in which the Constitution narrows the scope of treason is by omitting any analogue of the crime of compassing the king's death. Since most of the reprobated doctrines of the English law had developed under that head, it makes historical sense to look there for the kinds of doctrine which the framers wished to bar from the American law of 'treason'.

> There is of course some truth in the observation that the crime of compassing had no ready analogy in a republic; but to treat this as more than a minor factor would be to substitute bloodless logic for living policy."

The omission in the Constitution of any type of treason comparable to that of compassing the death of the king is thus of tremendous consequence. The treason of adhering to enemies, giving them aid and comfort, disassociated from the treason of compassing, was freed of those constructive extensions explainable solely by its being overwhelmed in treason trials by this more virulent treason.

The draft of the Constitutional provision concerning treason submitted by the Committee of Detail to the Constitutional Convention defined the treason simply as "adhering to the enemies of the United States, or any of them," omitting the phrase "giving them aid and comfort." (see Appendix to Res. 2nd brief, pp. 255-256). The Committee of the Whole, in inserting the words "giving them aid and comfort," thus directed its attention specifically to these words, and added them with an intent to restrict the crime (see Appendix to Res. 2nd brief, pp. 260, 281fn.). While the members of the Committee spoke only generally of restricting the offense, could it not be that by adding words on their face calling for actual aid and comfort they meant just that, that only actual aid and comfort should be treason? Assuming that their intent was to restrict the crime, their purpose could not have been merely to conform the Constitutional provision to the language of the statute 25 Edward III, since that language had already been constructively extended to include a certain type of attempt to commit the crime.

When the occasion arose for this Court to interpret the levying war provision of the treason clause of the Consti-

tution in *Ex Parte Bollman*, 4 *Cranch* 75, 8 U. S. 75, Chief Justice Marshall not only made the general observation "that the crime of treason should not be extended by construction to doubtful cases" (see Pet. 2nd brief, pp. 31-32), but also determined that under the Constitution the treason of levying war means what it says and requires an actual levying of war (*Ex Parte Bollman*, p. 126):

> "To constitute that specific crime for which the prisoners now before the court have been committed, war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offenses. The first must be brought into operation by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed."

That the treason of levying war should have been so restricted was not a foregone conclusion. In England conspiracy to levy war was treason. Since it was thought to be clearly the treason of compassing and imagining the death of the king, there was no need to extend the treason of levying war to cover it. Since the treason of compassing was not included in our Constitutional definition, the treason of levying war might have been extended to cover such a conspiracy as was certainly treason in England. But the treason of levying war was not so extended; the omission of such a treason as compassing the death of the king was decisive.

In the early judicial opinions concerning treason under the Constitution, it was clearly indicated that there should be great caution in the use of English authorities to interpret the Constitutional definition. While this was sometimes exemplified by a refusal to accept any guidance from

English authorities, the general result was a refusal to accept English doctrine developed under charges of compassing and imagining the death of the king (Appendix to respondent's brief, pp. 301 *et seq.*).

The doctrine that an attempt to give the enemy aid and comfort constituted the giving of aid and comfort is a doctrine that developed under the charge of compassing and imagining the death of the king.

The author of one of the appendices to respondent's brief reports, as to cases of treason in the United States (Appendix, pp. 307-308):

> "Nevertheless, though the reported decisions in treason trials are not numerous, when they are examined with a view to checking the practical reality of the restrictive policy, the preponderance of acquittals and of specific rules laid down with careful regard to the protection of the accused indicates that the restrictive policy has expressed an operative attitude and not merely a pious hope."

Under the Constitutional provision that "Treason against the United States, shall consist only in levying war against them, or in adhering to their Enemies, giving them Aid and Comfort," the treason of adhering is committed only by giving actual aid and comfort.

In conclusion petitioner desires to make brief comment on the Appendix to respondent's brief which contains very helpful material upon which petitioner has drawn freely in the preparation of this brief. Of course petitioner cannot, in the time allotted for the filing of this brief consider in detail the material contained in this Appendix and the conclusions drawn therefrom. The basic criticism petitioner has of the Appendix is the unreality of the distinctions there attempted to be set forth. On the crucial question of the meaning of an overt act of treason the distinction sought

be drawn is between acts "evidencing a treasonable intent," and acts "translating the intent into the world of action by some thing done towards its execution" (see Appendix, p. 65). That this in fact presents no workable distinction for practical purposes is shown by the respondent's brief, which adopts the distinction formulated in the Appendix, and by the Appen ix itself. Respondent rejects the sufficiency of some of the suggested overt acts in petitioner's hypothetical case (see Pet. 2nd brief, p. 3) on the ground that they would be inadequately related to the treasonable scheme in terms of purpose and effectuation (Res. 2nd brief, p. 23). Respondent accepts the ruling in the *Prior* case that going in a boat from a British vessel of war to the shore for provisions for the enemy was not a sufficient overt act. Respondent accepts the ruling on the ground that treason was not "sufficiently translated into the realm of action to satisfy the requirement of an overt act" (Res. 2nd brief, p. 62). Respondent explains the fact that conspiracy to levy war is not a sufficient overt act of levying war on the ground that "The overt act must, it is true, advance the intent so far in execution that it can be said that war is being actually levied" (Res. 2nd brief, p. 60). It becomes thus apparent that the test is satisfied, not by any act which "advances the intent in execution" but by an act which advances the intent in execution to some uncertain and vague extent. Since "one might emerge with the practical result of requiring the latter [that the overt act evidence intent], if he insisted that the act be very far along in execution" (Appendix to Res. brief, p. 366), respondent either ends up with the view for which petitioner contends, or with a proposition so nebulous and inconclusive as to be of absolutely no value in determining the sufficiency of overt acts of treason.

## Conclusion

**The Judgment Appealed from Should Be Reversed, and the Indictment Dismissed or, in the Alternative, a New Trial Ordered.**

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Respectfully submitted,

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